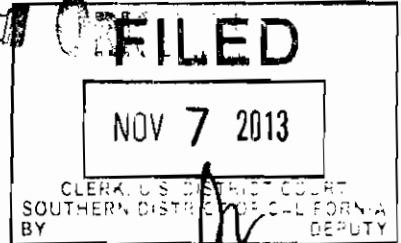


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UNSEALED PER [BT]
 Order



Attorney for Defendant Michael Vannak Khem Misiewicz

UNDER SEAL

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	Criminal No. 13CR3782-JLS
)	
Plaintiff,)	
)	
v.)	
)	SUPPLEMENTAL SUBMISSION IN
)	SUPPORT OF APPLICATION FOR
)	APPOINTMENT OF COUNSEL UNDER
MICHAEL VANNAK KHEM MISIEWICZ (2),)	18 U.S.C. § 3006A
)	
Defendant.)	
)	
)	

Mr. Misiewicz is charged with co-defendant Leonard Glenn Francis in a one count information with conspiracy to commit bribery in violation of 18 U.S.C. § 371. He has entered a not guilty plea. He seeks appointment of counsel under 18 U.S.C. 3006A. He supplements the previously established record with the following points and authorities.

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I.

STATEMENT OF FACTS

A. Summary Of Allegations

The government's investigation in this case focused on Francis and his company, Glenn Defense Marine (Asia) ("GDMA"), a U.S. Navy Contractor that has provided husbanding services to the Navy for more than 25 years. The government alleges GDMA engaged in fraudulent practices that resulted in over billing the U.S. Navy millions of dollars. The allegations in the complaint pertaining to Mr. Misiewicz focus on a two year period between 2010 and 2012, during which time he served, first, as the Commanding Officer of the USS Mustin deployed in the Seventh Fleet, and later as the Deputy Operations Officer for the US Commander Seventh Fleet aboard the USS Blue Ridge. During this time it is alleged Mr. Misiewicz provided "Confidential" information to Francis and GDMA, and used his influence to steer port visits of U.S. ships to GDMA's "Pearl Ports" in Asia; that is, those ports where it was most profitable for GDMA to provide husbanding services. It is alleged that Mr. Misiewicz, a decorated officer who has served more than 28 years in the Navy, was bribed with Lady Gaga tickets, airfare, hotel stays and prostitutes.

B. The Anticipated Cost Of Mr. Misiewicz's Defense

The defense of this case will require review of massive amounts of discovery, significant motions practice and extensive investigation here and in Asia.¹ A significant amount of discovery

¹ The declarations of attorneys Mark Adams and Merle Schneidewind (hereinafter, "Adams Decl." and "Schneidewind Decl."), are attached as Exhibits "A" and "B." In their declarations Mr. Adams and Mr. Schneidewind, experienced counsel who have defended similar cases, have offered their opinion on the anticipated course of this litigation.

1 will likely involve confidential or classified government information,
 2 and it is anticipated that the government will resist production of
 3 that discovery. Adams Decl., ¶ 2; Schneidewind Decl., ¶ 2. It will
 4 likely be necessary to research and litigate motions about issues
 5 arising under the Classified Information Procedures Act, 18 U.S.C. App.
 6 3 § 1 et seq., as well as other pretrial motions. Adams Decl. ¶ 2.
 7 Many of the potential witnesses are in Asia or in the military and
 8 scattered across the globe. Adams Decl., ¶ 2; Schneidewind Decl., ¶ 3.
 9 Some evidence may need to be taken in foreign jurisdictions. Adams
 10 Decl., § 5. It might take tens of thousands of dollars to locate,
 11 interview and call to testify a single witness from a foreign
 12 jurisdiction. See, Schneidewind Decl., ¶ 4. Experienced counsel have
 13 opined that to retain counsel in this case could result in legal fees
 14 up to between \$750,000 and \$1,000,000. Adams Decl., ¶ 5; Schneidewind
 15 Decl., ¶ 2.

16 II.

17 ARGUMENT

18 A. Standards For Appointment Of Counsel

19 The Criminal Justice Act ("CJA") provides for appointment of
 20 counsel "for any person financially unable to obtain adequate
 21 representation. . . ." 18 U.S.C. § 3006A(a). "Financial inability to
 22 obtain counsel is not the same as being indigent or destitute, but the
 23 defendant has the burden of establishing that he or she is financially
 24 unable to obtain counsel." United States v. Fincher, 538 F.3d 868, 875
 25 (8th Cir. 2008) (citing United States v. Brockman, 183 F.3d 891, 897
 26 (8th Cir. 1999); United States v. Harris, 707 F.2d 653, 660 (2d Cir.
 27 1983) (Financial inability to retain counsel "means something less than
 28 indigency or destitution."). "Any doubts as to a person's eligibility

should be resolved in the person's favor; erroneous determinations of eligibility may be corrected at a later time." Guide to Judiciary Policies and Procedures: Appointment of Counsel in Criminal Cases ("Guide"), Vol. 7, § 210.40.30(b).²

The Guide provides:

A person is "financially unable to obtain counsel" within the meaning of 18 U.S.C. § 3006A(b) if the person's net financial resources and income are insufficient to obtain qualified counsel. In determining whether such insufficiency exists, consideration should be given to:

(1) the cost of providing the person and his dependents with the necessities of life, and

(2) the cost of the defendant's bail bond if financial conditions are imposed, or the amount of the case deposit defendant is required to make to secure release on bond.

Id. at § 210.40.30(a). Here, the Court should bear in mind that \$100,000 of Mr. Misiewicz's assets are tied up to secure his release on bond. In addition, Mr. Misiewicz supports his wife and four minor children, who maintain a separate home in Illinois as the couple go through their divorce. Mr. Misiewicz, himself, has been living in Colorado Springs in a rented room with house mates. He has been paying \$450 per month, which included his utilities, telephone, cable television and internet service. Mr. Misiewicz intends to continue to live frugally, but his expenses will be considerably higher in San Diego.

B. Mr. Misiewicz Is Financially Unable To Retain Counsel

1. Mr. Misiewicz Does Not Have Sufficient Assets Or Income To Fund His Defense

² When counsel is appointed and it is later determined the defendant has the ability to pay all or part of the cost of his/her defense, the CJA makes provision for the reimbursement of funds. 18 U.S.C. § 3006A(f).

1 Experienced counsel have opined that the fees and costs in
2 this case could be as high as \$750,000 to \$1,000,000. Adams Decl., ¶
3 5; Schneidewind Decl., ¶ 6. No matter what financial data in the record
4 the Court considers, Mr. Misiewicz does not have the resources to fund
5 his defense. Mr. Misiewicz submitted to the Court (and to the
6 government) a financial affidavit on October 21, 2013.³ That
7 affidavit clearly demonstrates that Mr. Misiewicz could only come up
8 with a fraction of those estimated fees and costs. Moreover, even if
9 the Court uses the numbers contained in the Pretrial Services ("PTS")
10 report, and assumes that Mr. Misiewicz has control over his entire net
11 worth, he would still fall far short of being able to finance the
12 potential cost of his defense. And, of course, Mr. Misiewicz's pending
13 divorce proceedings make it likely he will probably only be left with,
14 at most, half of that net worth.

15 **2. Mr. Misiewicz's Assets Are Not Available To Him**

16 Not only are Mr. Misiewicz's assets insufficient to fund his
17 defense, they are also not available. As has previously been noted on
18 the record, the Dissolution Action Stay in Mr. Misiewicz's divorce
19 proceedings precludes him from "transferring, encumbering, concealing,
20 destroying, spending, damaging or in any way disposing of any property,
21 without the consent of the other party or an order of the court," with
22 several inapplicable exceptions.⁴

23

24

25 ³ Mr. Misiewicz previously submitted a financial affidavit to the
26 district court in Colorado. However, that affidavit was hastily prepared
27 while Mr. Misiewicz was in custody and did not have access to his
financial records. Accordingly, pursuant to an Order of the Court at the
October 10, 2013 hearing, Mr. Misiewicz submitted a new financial
affidavit and supporting documentation.

28

⁴ Both the Court and the government have previously been provided
with a copy of the Dissolution Stay.

1 Although Mrs. Misiewicz agreed to liquidate a mutual fund so
 2 that Mr. Misiewicz could post his \$100,000 bond,⁵ she has given no
 3 indication that she would agree to the liquidation or encumbrance of
 4 assets to pay any portion of Mr. Misiewicz's legal fees. The government
 5 has argued that the Court's "default" position should assume Mrs.
 6 Misiewicz's willingness to allow the couple's assets to be used for
 7 legal fees. However, there is a significant difference between
 8 allowing an asset to be liquidated for the purpose of securing a bond,
 9 and liquidating it or encumbering it to fund Mr. Misiewicz's defense.
 10 The funds being used to secure the bond will eventually be released; if
 11 the asset is used to fund Mr. Misiewicz's defense it will be gone.
 12 There has been no indication that Mrs. Misiewicz is willing to consent
 13 to the liquidation or encumbrance of assets, and it should not be
 14 assumed. See, United States v. Lexin, 434 F. Supp. 2d 836, 843 (S.D.
 15 Cal. 2006) (community property assets should not be considered when
 16 determining eligibility for appointment of counsel unless the spouse
 17 consents).⁶

18 **3. Mr. Misiewicz's Assets Cannot Be Readily Liquidated**

19 Even if the Dissolution Stay did not preclude Mr. Misiewicz
 20 from liquidating his assets, (and it does), there would still be
 21 impediments to Mr. Misiewicz using his assets to retain counsel. For
 22 example, although Mr. Misiewicz and his wife own real property, they
 23

24 ⁵ The \$100,000 that secures Mr. Misiewicz's bond is part of the net
 25 worth determination in the PTS report. It is clearly unavailable to be
 26 used for attorneys fees.

27 ⁶ The government also argued at the hearing that the Court should
 28 consider available in their entirety those jointly held assets over which
 Mr. Misiewicz exercises "dominion and control" and "can dispose of
 unilaterally." There are no assets he can dispose of unilaterally due
 to the Dissolution Stay.

1 are upside down on the mortgage of one piece of property. On another
2 property that is under contract for sale they owe more on the contract
3 than the property is worth.

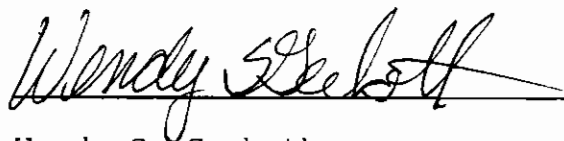
4 Mr. Misiewicz has used the county appraisal for tax purposes
5 to value his real property. Absent a formal appraisal, that is the
6 only actual, property specific valuation. The government urges the
7 Court to look to commercially available tools such as Zillow to
8 determine the properties' fair market values. However, those numbers
9 are imprecise, not property specific and there is no reason to believe
10 that in a short sale of the property Mr. Misiewicz would obtain fair
11 market value. Further, there would be costs associated with the sale
12 of the property that would reduce the proceeds available for legal
13 fees. Similarly, if Mr Misiewicz were to attempt to liquidate his
14 retirement accounts, there would be withdrawal restrictions, penalties
15 and tax consequences that would reduce the amount available after
16 liquidation. Accordingly, to the extent the Court considers these
17 assets, it should note that their entire value is not available in the
18 event of liquidation

19 **III.**

20 **CONCLUSION**

21 Mr. Misiewicz respectfully requests that the Court grant his
22 request for appointment of counsel.

23 Respectfully Submitted

24 

25
26 Dated: November 1, 2013

Wendy S. Gerboth
Attorney for Mr. Misiewicz

EXHIBIT

"A"

1 2) I have reviewed the complaint in this case. I believe that to provide
2 effective assistance of counsel and an adequate defense it is clear that attorneys fees
3 could easily exceed a minimum of \$750,000, with additional costs and expenses of at
4 least \$100,000. I also believe that appointment of co-counsel will be necessary, as it
5 is unlikely that one attorney alone will be able to devote the time needed to defend this
6 case.

7 2) This case will require litigation to gain access to classified information and
8 the review of a multitude of government regulations and hundreds of thousands of
9 documents. The government will likely oppose disclosure of much of the information
10 and documentation needed by the defense.

11 3) This case will also entail extensive investigation. Witnesses are located
12 around the world.

13 4) As one example of the work that could be required in this case, I have
14 focused on the allegations that Mr. Misiewicz notified a port contractor in charge of
15 providing husbanding services that a ship would be docking at that port in advance of
16 the time permitted by Naval regulations. The defendant might defend himself by
17 demonstrating it was safer for the ships to provide the contractor with more advanced
18 notice of a ship's arrival. As counsel, to support this fact, I would have an investigator
19 interview, and then call as a witness, the contractor in charge of providing security
20 services for the USS Cole that was bombed in port in Yemen, killing 17 servicemen.
21 Establishing this one fact alone could take tens of thousands of dollars in fees and
22 investigative services.

23 5) As another example of work necessary for the defense of this case, it is
24 likely that Mr. Misiewicz also had only a part in the decision making process as to which
25 ports ships would be directed to. Other decision makers will have to be located and
26 interviewed.

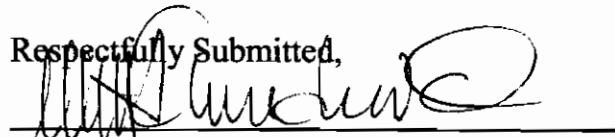
27 6) As set forth above, I again conclude that attorneys fees to provide an
28

1 adequate defense in this case could easily amount to \$750,000 with an additional
2 \$100,000 in expenses.

3 I declare, under the penalty of perjury, that the above is true and correct to the
4 best of my information and belief on this 30th day of October 2013 in San Diego,
5 California.

6 Dated: 10/30/13

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read 'Merle N. Schneidewind', is written over a horizontal line.

Merle N. Schneidewind, Esq.

EXHIBIT "B"

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8 UNITED STATES DISTRICT COURT
9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
10 (HONORABLE JANIS L. SAMMARTINO)

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.

14
15 MICHAEL KHEM VANNAK,
16 MISIEWICZ(2)

17 Defendant.
18

CASE NO. 13CR3782-JLS

DECLARATION OF
MARK F. ADAMS

19 I, Mark F. Adams, having been duly sworn, depose and state:

20 1) I am an attorney duly licensed to practice before this Court, the United
21 States Court of Appeals for the Ninth Circuit and the Supreme Court of the
22 United States. I have been practicing criminal law for 32 years, handling both
23 retained cases and cases appointed under the Criminal Justice Act. In the last
24 year I defended through trial a retained case involving allegations the defendant
25 bribed United States Navy officials. I have reviewed he complaint in this matter,
26 and have the following observations about what I believe would be required for
27 effective representation of this defendant.
28

1 2) There will likely be an extraordinary amount of discovery, including
2 discovery from multiple e-mail accounts, extensive surveillance evidence,
3 documents, photographs and electronic data. Judging from the nature of the
4 allegations, the defense will need to seek discovery of classified and unclassified
5 information from the National Security Administration, Naval Investigative
6 Services and other clandestine agencies which will implicate (and involve
7 litigation over) the Classified Information Procedures Act 18 U.S.C. App. 3 § 1
8 et. seq. Discovery litigation is likely to be extensive and time consuming.
9 Government resistance is to be expected.

10 3) Due to the complexity of the legal and factual issues, the defense of this
11 case will require extensive investigation. A significant portion of this
12 investigation will be overseas, as it appears many of the key locations and
13 witnesses are located throughout Asia, including Japan, Thailand, Hong Kong
14 and Malaysia. A team of investigators who speak various foreign languages will
15 be needed to properly manage the investigation. Associate counsel and local
16 investigators on the ground in the foreign venues will have to be retained and will
17 have to coordinate with the chief investigator in San Diego.

18 4) There is little doubt that counsel and investigators will be required to
19 submit to and qualify for a United States government security clearance in order
20 to defend the client.

21 5) In my view, qualified retained counsel would charge between \$400 to
22 \$800 per hour, plus expenses. If retained I would insist that the client engage co-
23 counsel as one attorney alone would be hard pressed to properly defend the case.
24 Co-counsel would be similarly compensated and associate counsel should be used
25 for research and discovery review at lower hourly rates. If this case were to
26 proceed to trial it is my opinion that the defense could cost in excess of one
27
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1 million dollars in attorneys fees, costs of investigation and related expenses,
2 bearing in mind the international nature of the investigation. If foreign defense
3 witnesses were needed, the defense would have to bear the cost of bringing each
4 of those witnesses to court. Litigation may be required to address allowing
5 foreign witnesses into the United States to testify. In some cases, the government
6 might require bonded and licensed investigators to accompany the foreign witness
7 while in the United States. And litigation in foreign countries might be necessary
8 to compel attendance of witnesses at foreign depositions or to attend trial
9 proceedings in the United States.

10 I declare, under the penalty of perjury, that the above is true and correct
11 to the best of my information and belief on this 30th day of October 2013 in San
12 Diego, California.

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15 MARK F. ADAMS
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE JANIS L. SAMMARTINO)

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL VANNAK KHEM MISIEWICZ (2),

Defendant.

Criminal No. 13CR3782-JLS

PROOF OF SERVICE

I, WENDY S. GERBOTH, certify:

1. I am over eighteen years of age, a United States citizen, a resident of the County of San Diego, State of California. I am not a party to the above-titled action.

2. My business address is 964 Fifth Avenue, Suite 214, San Diego, California 92101.

3. I caused service of SUPPLEMENTAL SUBMISSION IN SUPPORT OF APPLICATION FOR APPOINTMENT OF COUNSEL UNDER 18 U.S.C. § 3006A on the Court and by hand delivery to the Clerk's Office and to Attorney for the Plaintiff United States of America by hand delivery to the United States Attorney's Office.

I certify under penalty of perjury that the foregoing is true and correct. Executed on November 1, 2013 at San Diego, California.


WENDY S. GERBOTH